

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-4235

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-4235

JOSE E. MORE AND ADELA T. MORE,
Appellants,
- against -
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

ON APPEAL FROM THE UNITED STATES
TAX COURT

REPLY BRIEF FOR APPELLANTS

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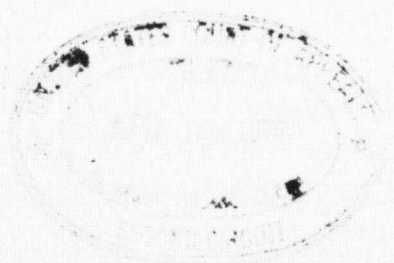


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Appellants, :
v. : Docket No. 76-4235
COMMISSIONER OF INTERNAL REVENUE, :
Appellee, :
- - - - - X

REPLY BRIEF FOR APPELLANTS

POINT I

GOVERNMENT HAS FAILED TO
REBUT APPELLANT'S ARGUMENT
THAT HE WAS NOT A "TAXPAYER
IN EXISTENCE"

In response to the Appellant's Point I in his main brief, the Government first rejects Appellant's claim that he was not subject to an internal revenue tax. Instead they counter that Appellant, in making such a claim, "fails to recognize the difference between receiving no reportable income for a given period (i.e., being liable for no taxes

for that period) and being not subject to taxation." (Br. 15.) The Government then cites the example of a citizen or resident alien who is unemployed for a few months during the taxable year as illustrative of an individual who is subject to tax, but simply happens to owe no tax.

We assert that the Government is confusing jurisdictional concepts with the separate and distinct concept of what constitutes gross income. To cite a case relied on by the Government (Br. 17), the Court in Simenon v. Commissioner, 44 T.C. 820 (1965), states on page 833:

The U.S. income tax law comprises two independent concepts of jurisdiction, the status of the taxpayer and the source of income; and with respect to the individual income tax, the United States asserts tax jurisdiction over the entire worldwide income of its citizens and alien residents. On the other hand, nonresident aliens are taxed only on income derived from sources in the United States, the contact of the U.S. tax jurisdiction being the source of the income rather than the recipient-person. (Emphasis supplied).

Thus, the incidence of the United States tax is based on in personam jurisdiction over its citizens and residents (and, to a lesser extent, over nonresident aliens with permanent establishments in the United States), and an in rem jurisdiction over nonresident aliens, not engaged in trade or

business within the United States, who receive income from United States sources. Bearing this distinction in mind, it becomes clear that the individual citizen or resident in the Government's example is indisputably subject to internal revenue taxes, even though he may not owe any tax, because his status (as a resident or citizen) results in in personam jurisdiction over him. The nonresident alien's situation, however, is clearly a different matter. The jurisdiction to tax the nonresident alien, not engaged in a trade or business in the United States, arises, in Congress' estimation, only from the fact that he draws income from sources within the United States. It follows, then, that a nonresident alien who has no United States source income cannot be said to be subject to United States internal revenue laws. Thus, at least in the situation of the nonresident alien, not engaged in trade or business within the United States, the distinction which the Government attempts to draw between "liable for tax" and "subject to tax" is functionally and semantically meaningless.

Despite the assertions of the Government to the contrary, Appellant was clearly in a "different situation than a United States citizen who happened to have been out

of work, or for any other reason without income, between January 1 and March 15, 1960." (Br. 16.) It is, we believe, patently absurd for the Government to take a position, the logical (and reasonable) extension of which is the general assertion that all nonresident aliens are subject to United States internal revenue taxes. We respectfully suggest that, before publicly announcing this new tax policy, the Treasury and Justice Departments should consult with the Department of State.

Nor can it be said that once a nonresident alien becomes a resident of the United States he retroactively becomes a taxpayer for income tax purposes. The case law and regulations are clear that income which a nonresident alien, not engaged in a trade or business in the United States, receives from foreign sources prior to becoming a resident of the United States is not subject to federal income tax. See, Steuer v. Commissioner, 7 T.C. 1075 (1946); Reg. § 1.6012-(b)2(ii).

This conceptual distinction between in personam and in rem jurisdiction may also serve to demonstrate the spuriousness of the Government's suggestion that Appellant's interpretation of "taxpayer in existence" would open the

door to abuse of the income averaging election. On page 11 of their brief, the Government claims that "there seems no reason why, assuming . . . [Appellant] had been resident during the entire five-year period 1960 through 1964 except for, e.g., a three-month stretch from May 1, to July 31, 1962, he could not then excise that period and create two short-years" The reason, of course, that this cannot be done, even if Appellant's argument is accepted by the Court, is that once an alien individual becomes a resident of the United States, he also becomes a "taxpayer" subject to the in personam jurisdiction of the Federal tax laws. This is essentially the theory adopted by the Court in Simenon, cited supra.

The Government next focuses its attack on Appellant's argument that a person who is not a "taxpayer" cannot be a "taxpayer in existence" for purposes of § 443(a)(2). They suggest that the proper emphasis in this phrase belongs not on the word "taxpayer", but rather on "in existence," and that the meaning of the whole phrase is clearly limited to "non-individual taxpayers such as corporations organized or terminated during a given period or . . . individuals who are born or die during such period." (Br. 16.) The

clear implication of the Government's suggestion is that § 443(a)(2) was never meant to apply to nonresident aliens.*

Had Congress selected the word "person" instead of the word "taxpayer" for use in § 443(a)(2), then Appellant might be forced to agree with the Government's assertion that the short period return requirements are not applicable to Appellant. This would seem necessary because the definition of the term person in § 7701(a)(1) is inclusive of the term taxpayer, defined in § 7701(a)(14), and thus, encompasses both taxpayers and non-taxpayers alike. But, of course, Congress did not select the word person. It selected the word taxpayer, and thus, we must presume a conscious choice of terminology by Congress in the drafting of this Section. The distinction in meaning between two words is marked.

*What the Government appears to be suggesting (Br. 19, n. 13) is that even though Appellant may not have been a "taxpayer in existence" during the period involved in 1960, he was a "person in existence" during the same time. The consequence of such an interpretation of the statute is that Appellant was in existence for the entire calendar year 1960 and therefore was required to file a tax return for the entire calendar year. For the reasons stated infra, we believe this position to be flatly wrong.

The term person, as defined, is rather neutral: it is devoid if the jurisdictional implications which we have demonstrated overlay the term taxpayer. We therefore suggest that it is reasonable to suppose that, by selecting the word taxpayer, Congress intended § 443(a)(2) to apply not only to corporate entities and decedent individuals, but also to persons who are not cognizable by the law (because they are beyond its jurisdiction) and thus do not have a functional existence for purposes of United States internal revenue laws.

The remaining two points of the Government's argument in rebuttal of Appellant's Point I constitute a bit of hand wringing over straw men of the Government's own manufacture. First, the Government raises the spector of undermining the concept of "annual accountability," because Appellant's theory purportedly would make the receipt of income determinative of what the tax accounting period is to be. Of course, this is not Appellant's position at all. On the contrary, our argument incorporates the statutory concepts of the taxable year. We merely assert that, on the specific facts of the instant case, Appellant was required by the provisions of § 443(a)(2) to file a return for a short period.

Lastly, the Government contends that cases such as Simenon v. Commissioner, cited supra, and Klaas v. Commissioner, 36 T.C. 239 (1961) are dispositive of the issue at hand. Appellant asserts that these cases are not controlling because they are distinguishable on at least two important grounds. First, in each case, the taxable year of the departing alien taxpayer was previously established as a calendar year. In Simenon, for instance, the taxpayer had been living in the United States since 1947 and had been filing individual tax returns on a calendar year basis since at least 1951. Id. at 822. A more important distinguishing factor is that in each case the departing alien clearly was a "taxpayer," as that term is defined in § 7701(a)(14), at the time of his departure from the United States. As such, he was subject to the in personam jurisdiction of United States internal revenue laws.

There are various tax avoidance opportunities that would be available to a departing alien (which are not available to an arriving alien) if an individual were to cease being a taxpayer on his departure from the United States, as the Simenon case demonstrates. It is not unreasonable then, that the United States continue to assert an in personam jurisdiction over the alien for the duration

of his taxable year--especially when the income against which the tax is asserted arises from his activities in this country. This extension of jurisdiction over the departing alien is analgous to the in personam jurisdiction which many states have bestowed upon their courts by means of various long-arm statutes.

In the instant case, of course, Appellant had no United States source income in 1960 prior to the time he became a United States resident. (Op. 7-8, R. 30-31.) Thus, there was no contact with the United States which could result in the establishment of the Appellant as a taxpayer until he actually became a resident of the United States.

The Government's attempts to distinguish the cases of Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974) and Bunnel v. Commissioner, 50 T.C. 837 (1968), upon which Appellant relies, are simply not convincing. The Government considers the finding of the Court in Aguilar as to the meaning of the term "taxpayer" to be gratuitous dicta. This is not so. In Aguilar the Court, for purposes of reviewing the nonresident alien's motion for an injunction against a jeopardy assessment, assumed that the nonresident alien was, as he asserted, not a taxpayer within the meaning of the Code and thus was not subject to any internal revenue

tax. This finding was relied upon by the Court in Aguilar for its determination that the jeopardy assessment pursuant to § 6861 in that case was illegal--an essential element in granting the Appellant's motion for an injunction.* The Government's suggestion that the court in Aguilar was unaware or unable to comprehend the provisions of § 871 is ridiculous since there were no factual findings in Aguilar which even suggest that the nonresident alien individual there was receiving U.S. source income of any kind, much less the sort that would be subject to tax under the provisions of § 871.

As to Bunnel, we would only point out that despite the two pages of the Government's brief which are occupied with trying to distinguish that decision, the Government has not succeeded in explaining or justifying the patent contradiction in the construction of the term "taxpayer" which it advanced in Bunnel with the construction which it now proposes to the detriment of Appellant. The essence of the

*The alternative ground that the Court relied on in Aguilar was its holding in Clark v. Campbell, 501 F.2d 108 (5th Cir. 1974) which held that the Government's failure to issue a deficiency notice was itself grounds for dismissal of the assessment. However, because of a conflict of circuits on this point at the time, the Court's ultimate holding was as stated above. See Aguilar, supra, at 130, n. 9.

Government's argument in Bunnel was simply that even though the Subchapter S Corporation was a person subject to internal revenue taxes, it was still not a "taxpayer" because its income was taxable to its shareholders, and thus it was excused from paying an income tax. But, now that the shoe is on the other foot, so to speak, the Government argues that, even though Appellant was not subject to an internal revenue tax, he should, none-the-less, be found to be a taxpayer. To paraphrase the Government's own brief (Br. 13), the fact that the Government's interpretation of the law is more pleasing (and beneficial to its revenue interests) in one case than in another should be wholly irrelevant.

POINT II

APPELLANT ASSERTS THAT THE TREASURY'S REGULATIONS AT § 1.1304-6(b) ARE INVALID

Appellant's rationale for looking beyond the Treasury's regulations at § 1.1304-6 for a definition of a short taxable year is that the regulations concerning the use of a short taxable year (which results because the taxpayer was not in existence) as a base period year are so

narrowly drawn that they are an arbitrary, capricious, and unreasonable interpretation of § 1304(f). It is a fact that the regulations at § 1.1304-6(b) admit of only one possible (and not very plausible) application; that is to the case of an infant born during the first base period year (for income averaging purposes) who, by the time he is five years old, has sufficient income to qualify for the income averaging election. We simply cannot believe that Congress ever intended that the availability of the income averaging election should be so rigidly and narrowly construed. In the face of such a constrictive and arbitrary interpretation of the statute, Appellant's position as to the meaning of the term "short taxable year," as it is used in § 1304(f), is a reasonable interpretation of the statute.

Dated: New York, New York
April 4, 1977

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I, ROBERT D. WHORISKEY, Attorney for Appellants,
hereby certify that on the 4th day of April 1977, service
of Appellants' Reply Brief was made by mailing three (3)
copies to Appellee by post-paid mail, addressed as follows:

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